

## Aberystwyth University

### *When I'm sixty-four*

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*Published in:*  
Cambrian Law Review

*Publication date:*  
2013

*Citation for published version (APA):*

Williams, J. R. (2013). When I'm sixty-four: Lawyers, Law and 'Old Age'. *Cambrian Law Review*, 34, 103-120.

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# THE CAMBRIAN LAW REVIEW 2003



2003

VOL. 34

VOL. 34 THE CAMBRIAN LAW REVIEW 2003

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# **“A SERIOUS UNDERTAKING”**

A Special Edition of

## **THE CAMBRIAN LAW REVIEW**

**VOLUME 34**

**2003**

Essays prompted by the entry of the Law Department at Aberystwyth  
into its second century

The Cambrian Law Review is published annually by the Committee of the  
Cambrian Law Review, Department of Law, University of Wales, Aberystwyth  
and printed by Gomer Press

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# When I'm sixty four: Lawyers, Law and 'Old Age'\*

John Williams

## Abstract

*The impact of law on older people is an under researched area. Law both creates and reinforces ageist stereotypes and seems inaccessible and unsuited to the needs of older people. This lecture examines the relationship between the law and older people and questions whether Elder Law is or should be a recognised branch of law or would such a development promote ageism? It identifies gaps in the working of the law, especially in relation to the abuse of vulnerable older people. Does existing law satisfy the positive duty to protect people from inhuman or degrading treatment under the European Convention on Human Rights? Would a new public law giving powers of intervention in the lives of abused vulnerable older people violate the right to a private life under article 8 of the Convention? If such a law were to be introduced (as advocated in this lecture), adequate safeguards are essential.*

## Introduction

Discussion of 'old age' is something best avoided, not least for those of us who feel that we are not yet there. Why remind ourselves of our own mortality? Old age is for the old and not a subject that should feature in public lectures let alone be taught in university law schools. We are an ageist society. Stereotyping older people is something that we slip into with alacrity. What springs to mind when mention is made of 'old age'? Rarely is it a current or future image of one's self; we all subscribe to the view that 'old age' is fifteen years older than we are.<sup>1</sup> The media plays an important part in defining our vision of old age. One significant transgression by the media is that it creates the impression that 'old people' do not exist. The prompts that remind us of an older population rarely emerge in the world of film and television. Age Concern and the Independent Television Commission discovered that only 7% of the television population (fictional and factual) are over sixty, even though they make up 21% of the real world.<sup>2</sup> When Frank Butcher's mother in Eastenders was diagnosed as having Alzheimer's disease, she was shunted off to Brighton – presumably because that is where people with Alzheimer's go! There was no attempt to include a storyline looking at the real world problems surrounding this illness – despite the fact that about 5% of those aged sixty five and 20% of the over

\* Professor John Williams, Head of the Department of Law, University of Wales, Aberystwyth – Inaugural Lecture, delivered on the 6<sup>th</sup> March 2002.

<sup>1</sup> Bernard Baruch, US business executive quoted in *Old Age is Always 15 Years Older than I Am*, Randy Voorhees, 2001, (Andrews McMeel, Kansas City)

<sup>2</sup> *Age in the Frame*, Age Concern and the Independent Television Commission, 2000.



eighty fives suffer from some form of dementia.<sup>3</sup> Eastenders is more comfortable with Dot and Jim – a mildly comical couple, with apparent good health living in a supportive community. However, programme makers might take note of the Age Concern findings – older people watch on average thirty seven hours of television a week, twelve hours more than younger adults.<sup>4</sup>

For many people Victor Meldrew sums up old age – grumpy, reactionary, trying desperately to fill the day, maudlin, longing for the good old days, waiting to die, the butt of other people's jokes and so on. In one respect, this is not bad as it shatters the illusion that all old people are nice, sweet and eternally grateful. They are not. However, it also makes some sweeping generalisations about older people. An interesting portrayal of older people is found in the road sign informing drivers of the existence of an 'old people's home' in the vicinity. The image of two stooping people, one dependent on a stick, suggests that old age is about being feeble, weak and infirm. It also suggests that older people pose such a threat to the rest of us that we need to be warned of their presence.

### What is 'Old Age'?

We do not like to think of ourselves as 'old' and we are evasive as to what we think constitutes 'old age'. In part, this is a reaction to the fear of our own mortality and what we perceive of as our inevitable senescence. Sadly, such pessimistic thoughts about our own aging do much to preserve and promote society's ageist view of the current generation of older people. If we anticipate our own 'old age' as negative and all about decline, it is no wonder that we treat the current generation of older people as a generation to be pitied, patronised and marginalized. It is only by making out that older people are different that we can reassure ourselves that we are not yet there. Ageism is something that we embrace because of our fear of growing older and our desire to distance ourselves from 'persons who are a proxy portrait of our future selves. We see the young dreading ageing and the old envying youth'.<sup>5</sup>

Why such gloom? Maurice Chevalier put the whole thing into perspective when he said that 'old age isn't so bad when you consider the alternative'.<sup>6</sup> Douglas H. Powell in his book *The Nine Myths of Aging* explodes some of the folklore surrounding the aging process. Of particular importance are those myths that say that all old people are the same, that unsound body equals unsound mind, that old dogs cannot learn new tricks and that old people are depressed and have every right to be so. In his 2001 Reith Lectures, Tom Kirkwood, Professor of Biological Gerontology at Manchester, presents a picture of old age that provides us with something to which we can look forward. Given, we hope, the inevitability of our own old age, his upbeat vision provides us with many reasons to redefine our thinking on our own 'old age',

and more importantly challenges our preconceived ideas of the current generation of 'older people'. He reassures us that '(W)e are not programmed to die but to survive'.<sup>8</sup> He notes that we are surviving longer, but this is 'marred by the extraordinary obsession we have with youth, which seems to exclude any true appreciation of age'.<sup>9</sup> He concludes with a challenge 'to put an end to age as something that we let get in the way of celebrating all individuals on this earth as true equals'.<sup>10</sup>

However, back to the definitional problem. What is 'old age'? We can avoid answering this question for a little bit longer by asking whether it matters. Is it the lawyer's obsession with definitions that requires us to flog this dead horse into further insensitivity? Maybe it does not matter. Indeed, the existence of definitions may feed society's rampant ageism. The introduction of pensions at the age of sixty or sixty five was a milestone in removing the threat of poverty from older people. However, the introduction of a fixed age for receipt of benefits, which may have been based on cost implications rather than anything else, also gave us the cultural stereotype 'old age pensioner'. 'Old age', as in 'old age pensioner', became administratively defined.<sup>11</sup> Old people were seen as dependent, incapable of contributing to society and belonging to one fixed homogenous group.<sup>12</sup> No recognition was given to the fact that they may be stubbornly independent, contribute to society in financial or other ways, and quite different from the cultural stereotype. Once you have a definition people will, whether by choice or otherwise, live down to it. Old age becomes a social construction. Nevertheless, we cannot escape the need for a demarcation between age and old age.

The age range of sixty to seventy appears to be generally accepted as representing the onset of 'old age'. There is considerable historical support for this proposition. Pat Thane suggests that sixty to seventy was 'so taken for granted in official discourse as the gateway to old age that it was seldom discussed or justified'.<sup>13</sup> Under the Ordinance of Labourers 1349, and later enactments, men and women over sixty were no longer liable to compulsory service under the labour laws and could no longer be prosecuted for vagrancy. Although the Poor Law provided no definition of old age, the age of sixty appears to have been the point of transition from able-bodied to non-able-bodied.<sup>14</sup>

Thomas Paine in the *Rights of Man*<sup>15</sup> argued that the first approach of age began at fifty:

At fifty though mental faculties of man are in full vigour, and his judgement better than at any preceding date, the bodily powers for laborious life are on the decline . . . He begins to earn less and is less capable of enduring wind and weather; and in those more retired

<sup>8</sup> Kirkwood T. *The End of Age*, (2001), (Profile Books, Croydon) p. ix.

<sup>9</sup> See note 8 at p. 10.

<sup>10</sup> See note 8 at p. 74.

<sup>11</sup> Wilson G. *Understanding Old Age*, (2000), SAGE, at pg. 5.

<sup>12</sup> See Thane P. *Old Age in English History*, (2000) Oxford University Press, at pg. 236.

<sup>13</sup> See note 12 at p. 25.

<sup>14</sup> See note 12, pp. 24-25 & 180.

<sup>15</sup> Paine T. *The Rights of Man*, ed Henry Collins (Harmondsworth, 1969), pg. 264.

<sup>3</sup> Gurcharan S and Webster S. *Elderly Care Medicine*, 2000 (Cavendish, London) p 36-7.

<sup>4</sup> See note 2.

<sup>5</sup> Robert N. Butler, *Dispelling Ageism: The Cross-Cutting Intervention*, (1989) Annals Am. Acad. Pol. & Soc. Sci. 138, 139 n.2.

<sup>6</sup> Quoted in Randy Voorhees, see note 1 above.

<sup>7</sup> Powell D. H. *The Nine Myths of Aging* (1998) W.H. Freeman and Co, New York.

employments where sight is required, he fails apace and sees himself like an old horse, beginning to be turned adrift.

A depressing prospect, but that is merely the *approach* of age. At sixty, he argues, old age begins:

At sixty his labour ought to be over, at least from direct necessity. It is painful to see old age working itself to death, in what are called civilised countries for daily bread.

Sixty to seventy has been generally accepted amongst Western societies as the age at which retirement benefits begin. However, by the latter part of the twentieth century two developments challenged the rigidity of this definition. The first was the increasing number of people taking early or 'premature' retirement. We now have people in their fifties receiving a pension – are they old? Secondly, there was the emergence of a generation of people sixty-five plus who are comfortably off and enjoying good health, and do not fit the stereotype old age pensioner.<sup>16</sup> It is interesting to note that eligibility for membership of SAGA is fifty, and eligibility for support from Age Concern is fifty-five. One wonders whether commercial considerations tempt the former into such a broad definition, and a concern for vulnerability rather than just age, the latter.

Any definition will have to be supple enough to ensure that what may be an honourable motive (and the provision of a pension is) becomes another basis for stereotyping. There is, perhaps, a case for a loose threshold definition that allows us to recognise and respect heterogeneity and which, in itself, is characterised by no legal intervention. For argument's sake, sixty five is as good an age as any and has a historical basis. Once the threshold stage is satisfied, we need to place the older person into a context. There are many such contexts. Employment and retirement spring immediately to mind, as do disability (physical or mental) and poverty. We can include within disability the complex issues that arise because of incapacity. The context that I wish to consider in this lecture is the abuse or neglect of older people.

Placing our older person within a context, the *possibility* of vulnerability arises. Should we intervene? What, if any should be the legal response? In employment and retirement is it right that people have to retire at sixty or sixty five years, even though able and willing to continue working? Bobby Robson, a septuagenarian, continues to be an excellent premieriership manager. In response to European legislation, the Government is already committed to scrapping compulsory retirement age by 2006.<sup>17</sup> Should age discrimination in employment be proscribed by Law, as is the case with race and sex? Europe, quite rightly, says yes and we must comply, eventually.

## 'Law and' and 'Law of' older people

If we wish to consider the question of whether, and if so what, legal response might be appropriate in the context of elder abuse, two approaches are discernible. First, there is the *Law and* older people and second the *Law of* older people. In the case of the former, we know that there is, for example, a criminal law designed to protect us all from what the Law identifies as criminal conduct. We expect that the criminal justice system will do its best to detect and prosecute offenders. For many older people who are the victims of crime (especially non-stranger crimes – that is, friend, relative, carer, professional, volunteer), such expectations are rarely matched by a willingness on the part of the criminal justice apparatus to engage the case. Indeed, it is interesting to note the language that we use (that I have used) when discussing such behaviour towards older people. We talk about *elder abuse*. If I were to physically attack you, you would probably ring the Police. It is highly unlikely that in outlining the event that you would use the word 'abuse'. Instead, you would use criminal or quasi-criminal language – 'assault', 'attack' and 'grievous bodily harm'. Yet, we rarely use this language when referring to non-stranger acts of violence against vulnerable older people. Instead, we use the word 'abuse'. This reflects, or may be causes, a de-criminalisation or a 'welfarisation' of such behaviour. The abuse of older people is perceived of solely as a welfare problem that requires a welfare-based response. We have denied elder abuse a criminal law persona. Of course, a contrary argument can be made, namely that the use of the word 'abuse' can paradoxically be indicative of a concern which is wider than crime. The difficulty is that that wider concern has not embraced the criminal nature of the activity; it might (although it is by no means certain) facilitate a multi-disciplinary concern over the welfare of the victim, but it rarely involves engaging the criminal justice system. It is worth noting that in the British Crime Survey there were zero returns for domestic crimes against people over 64 years, a category embracing elder abuse.<sup>18</sup> There are many reasons for this underreporting of private space crime. One may be the perception by the abused and the professionals that abuse is not a crime.

It should not be assumed that the use of the criminal justice system and the criminal law is a panacea and is always appropriate in cases of elder abuse. Although we need to be careful not to draw too much upon child protection experiences, it is true to say that the use of the criminal law in cases of physical abuse, sexual abuse, and the neglect of children is not always in the best interests of the child and is in some instances not pursued. Similarly, with older people the use of the criminal law might be detrimental to the victim's welfare. Nevertheless, the under-use of the criminal law cannot be a result of carefully balanced judgements in individual cases. Rather it emanates from preconceived ideas on the part of the Crown Prosecution Service, lawyers and Police as to whether prosecution is in the 'public interest' and whether the older victim will make a 'good' witness. The Centre for Criminological Research at Oxford found that vulnerability in adult victims (in this case learning difficulty) often resulted in inadequate investigation, or a decision by the police not to charge the accused, that was acquiesced in by the Crown Prosecution

<sup>16</sup> See note 12 at p 460.

<sup>17</sup> Pension must rise to 67 for all', Gaby Hinsliff, *Observer*, 10<sup>th</sup> February 2002.

<sup>18</sup> *Crime in England and Wales 2002/03*, Home Office, 2003. Table 5.01.

Service.<sup>19</sup> It remains to be seen whether the changes introduced under the Youth Justice and Criminal Evidence Act 1999, designed to assist vulnerable adults in giving evidence (for example, pre-recorded video interviews, inter-active video, support persons, intermediaries) will make any difference. If we are to tackle the problem of elder abuse, we must not be misled by the use of the word 'abuse' to think that this is solely a welfare issue outside of the criminal law. Therefore, we need to have regard to the lack of opportunities for older people to benefit from the protection of Law designed to protect all citizens.

However, should we also have a Law of older people? This question invites that celebrated preamble to any advice from a lawyer, – 'on the one hand ... but on the other hand ...' On the one hand age, and especially old age, is something that requires a bespoke Law. Pensions, taxation, housing, and welfare benefits all include topics that are exclusive to 'old age' and form a corpus of Law of older people. The case for an anti age discrimination law is persuasive, not least in the area of public sector provision. A study by the King's Fund, *Old Habits Die Hard: Tackling age discrimination in health and social care*,<sup>20</sup> found that three out of four senior managers in health and social services believed that age discrimination existed in some form or other in services in their local areas. Many believe that ageism is endemic. It manifests itself in many ways, for example, policies restricting access to particular facilities and treatments by setting upper or lower age limits. The study notes the potential for Government guidelines or national standards for the provision of services for older people, but advocates anti discrimination legislation as the most effective way of removing discrimination. It does warn, however, of the perverse effect such legislation may have for health care staff to act defensively and continue treatment of an older person when humanity suggests that a dignified death is appropriate.<sup>21</sup>

So, that is the one hand. On the other hand, how far to we want to go in identifying the 'old' as a group worthy of special protection or intervention? Does not this simply reinforce the stereotype homogenous OAP referred to earlier? Yes, it does, but as we cannot avoid some Law designed solely for older people, we need to be aware of the damage that such Law can cause.

Perhaps there is a third hand. On this hand, we see areas of more widely applicable Laws, which have a disproportionate impact on older people. A good example of this is the Law relating to the regulation of residential care homes previously found in the Registered Homes Act 1984, but now found in the Care Standards Act 2000. Although residential care is available to many groups of adults, people aged over sixty five years occupy some 75% of places in the sector.<sup>22</sup> Similarly, if we look at incapacity, abuse of vulnerable adults, wills, mental health, and community care, these primarily affect older people and quite properly can be regarded as part of the Elder Law. Elder Law, shares some

<sup>19</sup> Sanders A, Cretton J, Bird S and Weber L, *Victims with Learning Disabilities – Negotiating the Criminal Justice System*, Centre for Criminological Studies, Oxford University, Occasional Paper No. 17 (1997).

<sup>20</sup> *Old Habits Die Hard: Tackling age discrimination in health and social care*, Roberts E, Robinson J, and Seymour L, (King's Fund Publishing, London) 2002.

<sup>21</sup> See note 20 at p 17.

<sup>22</sup> *Social Trends* No. 32, 2002, Table 8.9.

common ground with vulnerable adult groups, for example adults with learning difficulties, physical disability and mental disorder, and in a limited way, children. Whereas we need to recognise the obvious links between these groups in developing the Law, we must also avoid the 'one size fits all' approach and assume that their needs, rights and abilities are identical. Within that cohort of vulnerable adults, we must be aware that the needs of the eighty five year old may differ considerably from the needs of a younger person with learning difficulties. However, it is essential to constantly remind ourselves that most older people are not vulnerable.

Perhaps self-interest leads me to conclude that there is, or should be, a body of law known as Elder Law. For most purposes, older people can and should be accommodated within the general laws that apply to us all. It is the inability of some older people to financially, physically and intellectually access these laws that should concern lawyers. But, there is also a body of Law that addresses issues of exclusive or primary concern to older people. Nevertheless, recognition of this corpus should not contribute to the discrimination experienced by older people. Law, and the lawyers who apply it, need to be sensitive and flexible. We lawyers need to broaden our horizons; the Law of older people is not just about wills, tax and euthanasia.

## Abuse of vulnerable older people

The decriminalisation of elder abuse referred to above, enables us to claim that reports about the extent of elder abuse are scare mongering and a figment of the over active imagination of interfering social workers. There is no doubt that we are in denial. The analogy with domestic violence is striking.<sup>23</sup> Sadly, elder abuse does take place. Research on the incidence of elder abuse is scarce, especially in the United Kingdom.<sup>24</sup> One of the reasons for the paucity of research on elder abuse is the absence of any agreed definition.<sup>25</sup> Elder abuse has been defined as,

A single or repeated act or lack of appropriate action occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.<sup>26</sup>

The element of trust appears to be a feature of many definitions. It usually involves a family member, a carer or a professional care worker. What form does this abuse take? Action on Elder Abuse analysed the profile of 1421 calls received on their help line and identified the following categories.<sup>27</sup>

<sup>23</sup> The availability of private law domestic violence legislation, in particular the Family Law Act 1996, provides a possible remedy for some forms of elder abuse. However, it does not cover all forms of abuse and should not be seen as an alternative to a public law protecting older people. See below note 30. It will be interesting to see the impact of the recently published Domestic Violence: Crime and Victim Bill 2003 will be if passed by Parliament. It includes the offence of familial violence which incorporates the killing of vulnerable adults.

<sup>24</sup> Burston BMJ Sept 1975 6.592, 24/10/92.

<sup>25</sup> For an interesting overview of the various definition see Glendenning F in *The Mistreatment of Elderly People*, eds Decalmer P and Glendenning F (SAGE, London) 1997, pp 13-41.

<sup>26</sup> Action on Elder Abuse, 1995.

<sup>27</sup> *Listening is not enough*, Jenkins G, Zee A and Bennett G (Action on Elder Abuse, London) 2000.



Category	Callers
Societal	30
Sexual	38
Other	46
Neglect	204
Financial	454
Psychological	776
Total	1421

As far as the location of the abuse is concerned, the home is the main locus.

Location of abuse	Callers
Sheltered Housing	35 (2%)
Hospital	61 (4%)
Residential Home	73 (5%)
Nursing Home	146 (10%)
Own home	169 (12%)
	969 (67%)

The identity of the alleged perpetrator reveals that non carer relatives appear to represent the largest group.

Perpetrator	%
Carer (family)	1.9
Other	10.2
Friend/neighbour	12
Paid worker	29.4
Relative	46.5

This sample is not necessarily representative and is open to challenge on methodological grounds. However, the figures do show that reported elder abuse takes many different forms and is perpetrated by people with whom the abused person is entitled to have a relationship based on trust.

## What can we learn from child protection procedures?

The Children Act 1989 and the accompanying official guidance, *Working Together*<sup>28</sup> establish procedures for intervening in family life in order to protect children from abuse; these procedures exist within a clear and coherent legal framework. One argument is that this law and these procedures could be adapted to cover vulnerable older people. A simple 'find and replace' on the word processor could provide us with the necessary Law. However, there are dangers in drawing too many analogies between children and vulnerable older people at risk of abuse. Brogden and Nijhar argue in relation to elder abuse that,

<sup>28</sup> *Working Together*, Department of Health, Home Office and Department of Education and Employment, (HMSO, London) 1999.

A central tenet has been that children and elder persons are similarly vulnerable. The abuse paradigm that dominated research into elderly victimisation made key mistakes in drawing on this child abuse research. The latter led elder victimisation into a welfare trap. False parallels kept elder victimisation outside criminological concerns.<sup>29</sup>

Children do not enjoy the same degree of autonomy as adults, so any attempt to adapt child protection legislation runs the risk of infantilising vulnerable older people. That is not an argument against public law intervention; rather it is reminding us of the need to recognise that vulnerable older people are not children.

## The Human Rights Act 1998

The Human Rights Act 1998 presents many challenges to professionals working with vulnerable older people. The main effects of the legislation are to make the rights in the European Convention on Human Rights (ECHR) directly enforceable in courts and tribunals within the United Kingdom, and to impose a duty on 'public authorities' to act in a way that is consistent with the ECHR rights. The Act provides a fresh impetus to the debate on whether we need a public law to protect vulnerable older people from abuse.<sup>30</sup> In 1995, the Law Commission recommended that local authorities should have a statutory duty to investigate where they had reason to believe that a vulnerable person was at risk of suffering significant harm. It further recommended a statutory power of entry, and the ability to apply to a court for an entry warrant, assessment order or temporary protection order.<sup>31</sup> Thus far, the Government has rejected the proposals arguing that existing initiatives have still to be evaluated.<sup>32</sup> Whether this position can still be defended since the HRA 1998 is debatable.

A number of the rights found in the ECHR are relevant to the debate on the need for a public law on vulnerable older people protection.

### Article 2

Article 2 protects the right to life. This does not mean that we are all entitled to life saving treatment. However, it does have the effect, for example, of outlawing ageist 'do not resuscitate' policies within health care.

### Article 3

Article 3 ECHR states that, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

<sup>29</sup> Brogden M and Nijhar P and, *Crime, Abuse and the Elderly*, 2000 (Willan, Cullompton), p 18.

<sup>30</sup> See Williams J, *Public Law Protection of Vulnerable Adults*, 2002 *Journal of Social Work*, 2(3): 293-316 and Williams J *Human Rights Act 1998: Social Work's New Benchmark*, 2001 *British Journal of Social Work*, 31:831-44.

<sup>31</sup> *Mental Incapacity*, Law Commission Report No. 231.

<sup>32</sup> *Who Decides? Making decisions on behalf of mentally incapacitated adults*, Lord Chancellors Department, 1997.

Clearly physical and sexual abuse of vulnerable older persons falls within the definition of 'inhuman and degrading treatment'. In *Ribitsch v Austria*<sup>33</sup> the European Court emphasised that the vulnerability of the victim is an important factor in deciding whether treatment falls within article 3. In *X v Netherlands*<sup>34</sup> the European Commission found that the sexual abuse of a sixteen-year-old woman with learning difficulties, caused mental suffering leading to psychiatric disturbance falling within Article 3. The *X v Netherlands* case is also important in establishing the principle that the State may still violate the article even though the treatment takes place in somewhere other than a public institution – in this case it was a privately run residential home. This point was re-emphasised in *A v UK*.<sup>35</sup> It involved a stepfather severely beating a nine-year-old child with a garden cane. The stepfather was acquitted by a jury of assault based on the defence of 'reasonable chastisement'. The child applied to the European Court, arguing that the State had failed to protect him against a breach of article 3. The European Court agreed and stated that the ECHR,

*requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. (emphasis added)*

Thus, the State has a positive duty to protect vulnerable people from abuse in their own homes in private residential or nursing home settings, as well as in publicly run institutions.

#### Article 8

Article 8(1) ECHR states,

Everyone has the right to respect for his private and family life, his home and his correspondence.

Fear of violating the right to a private life, which embraces personal autonomy, is one reason why the Government decided against adopting the Law Commission's recommendations. The right to autonomy is jealously protected by the law, especially the right to refuse medical treatment. If somebody has the legal right to refuse life saving medical treatment (see *Re T*),<sup>36</sup> then surely he or she must also have a right to refuse intervention when they are the victims of elder abuse. As with a number of the ECHR rights, the rights of the individual have to be balanced against broader State interests and concerns. In the context of article 8(1), the right to autonomy has to be balanced against the duty the State has to protect vulnerable people. For example, people who lack the legal capacity to decide for themselves should not be excluded from receiving care or medical treatment simply because they are incapable of giving a valid consent to having their autonomy compromised by the State. But should intervention be limited only to those who lack capacity, or should it be extended to those with capacity, but who are highly vulnerable and at an unacceptable risk of abuse? This is a much more difficult balancing act.

<sup>33</sup> (1996) 21 EHRR 573.

<sup>34</sup> (1986) 8 EHRR 2.

<sup>35</sup> [1998] 2 FLR 959.

<sup>36</sup> [1992] 4 All ER 649.

Article 8(2) ECHR allows States to interfere with the rights in article 8(1). However, any interference must be in accordance with law that is accessible and enables people to foresee the consequences of that law for them. Furthermore, the restriction must be for one of the reasons listed in article 8(2) – the relevant ones are public safety, protection of health or morals, the prevention of disorder or crime, or the protection of rights of others. The restriction must also be proportionate to the aim being pursued.

At present, we do not have a law allowing intervention that complies with these requirements. Any intervention (for example, removing the victim from the home) relies on the use of professional skills of persuasion, subterfuge and bluff. Alternatively, it may involve the inappropriate use of the Mental Health Act 1983 and s.47 National Assistance Act 1948 (which provides for the compulsory removal of the aged and infirm from unsanitary conditions). Thus, for the law-makers the challenge is to decide whether the current Law on intervention (the common law on incapacity, the Mental Health Act 1983 or the National Assistance Act 1948) are appropriate, or whether a new law is required to redefine and extend the circumstances in which interference with the right to a private life is deemed necessary. In deciding this, regard must be had to the positive duties of protection found in the ECHR.

## Articles 1 and 14

Article 1 ECHR requires the signatories to 'secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.' This has been interpreted as imposing a positive duty on the State to prevent violations of ECHR rights and not just to remedy wrongs when they take place. The European Court in *Osman v UK*<sup>37</sup> held that it was sufficient,

... for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they ought to have knowledge.

Thus, the State has a positive duty to do all that could reasonably be expected to protect vulnerable older people from abuse. Clearly, in responding to this duty, it must also have regard to the right to a private life outlined above. It is necessary to strike the appropriate balance between autonomy and protection. Nevertheless, the large gap in legal protection, as evidenced by professionals' inability to intervene in extreme cases of abuse, takes the autonomy argument too far. It elevates the right to autonomy to a level that seriously compromises the State's positive duty to protect vulnerable older persons. Finally, article 14 prohibits discrimination in the enjoyment of Convention rights on a number of different grounds, which must include age.

<sup>37</sup> (1999) EHRLR 228.

## 'In Safe Hands' and 'No Secrets'

The Department of Health and the National Assembly for Wales have issued guidance on interdisciplinary working in vulnerable adult abuse. The guidance is found in two documents: *In Safe Hands*,<sup>38</sup> and *No Secrets*.<sup>39</sup> Both documents provide a framework for the development of good practice between the statutory and voluntary bodies involved in vulnerable adult abuse. As far as they go, they are a very useful addition to the development of good practice when responding to vulnerable older person abuse. However, they fall far short of a public law on vulnerable adult protection. Good practice must develop within an appropriate legal framework; for vulnerable older person abuse, that legal framework is lacking. Unlike *Working Together*, the child protection guidance, *No Secrets* and *In Safe Hands* do not operate within a defined set of statutory powers and duties. *Working Together* operates within the framework prescribed by the Children Act 1989, where legal powers are clearly defined and safeguards (procedural and substantive) are included. The criteria for intervention are identified. These are essential requirements under the HRA 1998. Article 5 ECHR states that 'everyone has the right to liberty and security of person'. Nobody can be deprived of his or her liberty except for one of the reasons specified in article 5(1). Furthermore, any intervention must be 'in accordance with a procedure prescribed by law'. Guidance or good practice falls short of being such a procedure. Article 6 ECHR also gives people an entitlement to a 'fair' hearing when their civil rights or obligations are being determined. The requirement of 'due process' is crucial to the protection of rights under the ECHR. Soft law will not do.

## Should there be a new law?

Vulnerability is an unpleasant fact of life. At various stages of our lives we are vulnerable. It may be a consequence of age, illness, poverty, inexperience, or any one of a number of reasons. If we predicate some form of legal intervention into the lives of older people on the idea of vulnerability, we have to recognise that there are degrees of vulnerability. For example, each year 30% of the population over sixty five and living in the community suffer from falls. Falls are the most important cause of hospitalisation for older people. It is a leading cause of death amongst people over 75, far exceeding deaths from pneumonia, diabetes or other diseases of the elderly. It is far greater that deaths from road traffic accidents or fire.<sup>40</sup> Older people living in the community are, therefore, vulnerable. However, the suggestion that all people over sixty five should be removed compulsorily from community living because of the risk of death or injury from falling is nonsense and would quite rightly be rejected; a good example of the application of the principle of proportionality mentioned earlier. We have to look at the degree of vulnerability and the degree of risk, before we contemplate legal intervention.

<sup>38</sup> Social Services Inspectorate for Wales 2000.

<sup>39</sup> Department of Health and Home Office, 2000.

<sup>40</sup> See note 3 at pp 9-10.

Incapacity is a cause of vulnerability. The Law recognises that intervention in the lives of people with incapacity is necessary in their 'best interests'. Despite numerous proposals to reform this area of Law, the Government has thus far refused to follow the Scottish Parliament's exemplary lead in passing the Adults with Incapacity Act 2000. This Act provides a statutory framework for decision-making in respect of people with incapacity. It recognises the need to provide safeguards against abusive or inappropriate intervention, but also the need to have in place a legal basis upon which proxy decisions can be made in their 'best interests'. In Wales and England, we are less advanced. Until recently the Government believed that legislation was not a priority; instead the Lord Chancellor's Department prepared a series of Codes of Conduct for those involved in the decision making process. More recently a draft Mental Incapacity Bill for England and Wales has been published;<sup>41</sup> belatedly the Government has realised that the existing common law is woefully inadequate and provides very few safeguards for incapacitated people and those charged with taking decisions on their behalf.

In Wales and England it has been left to the judges to develop the Law on decision making on behalf of incapacitated people. In the 1990 case of *Re F*<sup>42</sup> the court was faced with the dilemma of deciding whether an incapacitated thirty five year old woman with profound learning difficulties should be sterilised. She was in a relationship with a man, a relationship which was not considered abusive. The problem was that she lacked capacity to consent to the sterilisation. What could be done? The House of Lords decided that, in the absence of any other legal powers, and where there was a necessity to act, treatment of an incapacitated patient could go ahead if the doctors felt that it would be in his or her 'best interests'. Best interests is a notoriously difficult thing to identify; I defy anybody to tell me what is in my best interests – kind and compassionate though your assessment may be, I may have a completely different agenda. This places a lot of power in the hands of the professionals, and does not provide any safeguards for a patient, an important point since the Human Rights Act 1998. More recently, the test has been extended to cover situations of potential abuse of a vulnerable adult.

The case of *Re F*<sup>43</sup> (2000) highlighted a major weakness in the protection of vulnerable adults lacking capacity. It concerned an eighteen-year-old woman, T, with a mental age of 5 to 8 years who lacked legal capacity. During much of her childhood the local authority had looked after her under the child protection legislation. The local authority placed her in accommodation just before her seventeenth birthday, with the consent of her parents. They eventually withdrew their consent. Butler-Sloss P in the Court of Appeal described T's family background as a catalogue of sexual abuse, physical abuse and neglect of T. The

<sup>41</sup> Despite its earlier apparent opposition to legislation on incapacity, the Government in July 2003 published a draft Mental Incapacity Bill. The Bill seeks to put decision making in relation to people with incapacity on a statutory footing. It covers the definition of incapacity, the general authority, lasting powers of attorney, advance decisions and the Court of Protection and Public Guardian. If the Bill becomes law, it will be the first step towards greater statutory protection for vulnerable adults. See *Draft Mental Incapacity Bill*, House of Lords and House of Commons Joint Committee on the Draft Mental Incapacity Bill, Session 2002-03, HL Paper 189-I and 189-II.

<sup>42</sup> *Re F (Adult Patient: Sterilisation)* [1990] 2 AC 1.

<sup>43</sup> *Re F (Adult Patient)* [2000] 3 WLR 1740.



Court noted the lack of a statutory jurisdiction enabling the local authority to intervene to protect T. The Court was compelled to use the doctrine of 'necessity' and best interests, as approved by the courts in *Re F* (1990) and subsequent cases. It concluded that, following *Re F* (1990), 'the common law of necessity would in appropriate cases permit otherwise tortious interferences with the personal integrity of the mentally incapacitated.' (p. 1756). The court granted a declaration in favour of the local authority that T should remain in their care with limited family contact.

This 'make it up as you go along' approach is unacceptable. The requirement under the ECHR for procedural safeguards and clearly stated law are not satisfied. The Court in *Re F* (2000) recognised that it was the role of Parliament and not the courts to devise vulnerable adult protection laws. For present purposes, it is encouraging to note that the draft Mental Incapacity Bill provides a definition of incapacity, would authorise people to act on behalf of the incapacitated person, and would provide adequate safeguards against abuse and misuse of these powers. Such legislation would also provide us with legal guidelines for determining what is in the 'best interests' of such patients; the fact that professionals say it is, is not satisfactory.

At the other end of the scale, we have situations where vulnerable older people are subjected to abuse, but have capacity and are prepared to accept what is happening to them. It may be that the person abusing them is their son or daughter, with whom they do not wish to lose contact; it may be an informal carer, perhaps a spouse or partner, and they fear losing that care if action is taken. In short, they feel that the abuse is a price worth paying. These scenarios raise many ethical issues.<sup>45</sup> Should we ever condone abuse and simply seek to manage it? Are we sure that the person is 'consenting' to this abuse of their own free will? This is strange language to use given the power relationship between abuser and abused. How far are we prepared to allow a person's autonomy to dictate what happens in such cases? The article 8 right to a private life suggests that the Law allows a degree of self-determination in this area. This is particularly the case with financial abuse – if I choose to do something foolish with my money, such as give it all to an unscrupulous relative, that is my business even though it may leave me impoverished. It can, however, also extend to cases of physical abuse or neglect where the level of vulnerability is low, the risk of serious harm is low and where compulsory legal intervention may well worsen what is a bad situation. This approach stretches our belief in autonomy to its limits. However, it recognises the right to a private life and that intervention is not always appropriate. What we need to do is to ensure that adequate alternatives and support are offered to such people through the provision of appropriate social care. Such social care must meet the needs not only of the older person, but also those of the vast number of informal carers (spouses, family, partners, and neighbours) who are placed under intolerable strain with little or any no public support.

The current provision of social care is woefully inadequate. The Social Policy Ageing Information Network recently reported that social care services

are showing signs of major strain.<sup>46</sup> Social services funding has not kept up with the increase in demand and the raised expectations created by political hype on the impact of community care. Moderate needs are no longer met; instead we practice crisis intervention – we wait until abuse has crossed the Rubicon and is threatening life or serious injury. Increases in NHS funding for the elderly must be matched by increases in social care funding. Here we see an opportunity for the National Assembly for Wales to show that same kind of initiative as the Scottish Parliament and promote integrated social and health care for older people. It must ensure that health and social services no longer have to argue whether a bath in the older person's own home is fulfilling a health or social need.

A more difficult category of people to deal with are those who have capacity, but are extremely vulnerable, and at risk of significant harm. To what extent can the autonomy argument be used against compulsory State intervention? *Laskey v United Kingdom*<sup>47</sup> illustrates that there are limits on the right to enjoy a private life. The case involved the successful prosecution of a group of sadomasochists under the Offences Against the Persons Act 1861. The applicants emphasised that all those involved were willing and consenting. The United Kingdom argued before the European Court that the state was entitled to punish violence irrespective of the consent of the victim. It likened some of the acts to torture and maintained that no state could be obliged to tolerate them simply because they took place in the context of a consenting relationship. The European Court found that the restrictions imposed on these activities were not a violation of article 8 ECHR, but were necessary for the protection of health (see 8(2)). Some caution is necessary in drawing too much succour from this case as support for a law on vulnerable older person abuse. It is abhorrent to suggest that victims of elder abuse give, in anything other than an involuntary sense, any form of consent to acts of violence and abuse. Nevertheless, the *Laskey* case emphasises that the state can impose restrictions on the article 8 right, even when the injured party is freely consenting. How much stronger is the case for imposing such restrictions, through state intervention, on involuntary and vulnerable victims?

Passing laws does not necessarily resolve social problems. It is salutatory to note that public law protection for children started with the Industrial Schools Acts of 1857, 1861 and 1866 and yet we still have child abuse.<sup>47</sup> There are limits to what the law can achieve and it is important not to overstate the contribution that any new legislation may have on vulnerable older person abuse. Nevertheless, the law has a role to play and, as outlined above, the HRA 1998 imposes obligations on States to protect vulnerable people. At present there appears to be a significant gap in the law that leaves social workers, residential care staff and health staff powerless to intervene in cases of extreme abuse. The only option open to them is to use their professional skills to persuade or cajole an unwilling victim of abuse to consent to some form of intervention. This is far from satisfactory. It is timely to revisit the thinking

<sup>45</sup> *The underfunding of social care and its consequences for older people*, December 2001, [http://www.helptheaged.org.uk/news/pr3101\\_02.htm](http://www.helptheaged.org.uk/news/pr3101_02.htm) (accessed 14/02/02).

<sup>46</sup> (1997) 24 EHRR 39.

<sup>47</sup> Bevan, H. *Child Law* (Butterworths, London) 1989, pp 622-23.



behind the Law Commission's original proposals and ask whether they can be adapted to take account of recent developments, most notably the HRA 1998.

Law is only one part of a more complex solution involving changing attitudes amongst young and old, abusers and abused, and society in general. Criminal and public law may perform an educative role and help change attitudes. Improved access for victims to the criminal justice system is essential, and we must no longer restrict our response to welfare intervention. Similarly, public law has a role to play. Much of the above discussion has been about responding when something goes wrong. It is essential that that we have a law that prevents elder abuse. However, a new public law should allow timely intervention by social workers, or others, before the point of unacceptable risk. It seems that the time has come when social workers and others should no longer feel the frustration and anger of being unable to intervene in cases of abuse. A public law on elder abuse is necessary.

In formulating a new public law to prevent elder abuse, the following matters need to be resolved. What powers of intervention should be included? A wide range of powers could be made available. The proposals in *Mental Incapacity* (1995) provide a basis. Perhaps mandatory reporting should be introduced. Many of the American States have mandatory reporting laws imposing duties on professionals and in some cases the public, to report cases of elder abuse to the authorities. Certainly, a duty to investigate with powers of entry would allay some of the concerns of professionals. A power to remove either the victim or the abuser is also necessary.

There must be procedural safeguards to ensure that the proposed intervention is lawful and within the terms of the ECHR. Such safeguards should include clearly defined criteria for intervention; restricting emergency intervention to a limited period of time; ensuring that a court or tribunals considers the appropriateness and legality of the intervention; and provide the subject of the intervention with an opportunity to be heard.

Who is the law designed to protect? Is it to be restricted to people without capacity? If so, it leaves a significant number of very vulnerable older persons at unacceptable risk without any adequate protection. A wider definition of 'vulnerable adult' is required. Here we must return to Scotland for inspiration. I noted above the Scottish Adults with Incapacity Act. It is now likely that Scotland will go one step further and extend the protection of the Law to other vulnerable people. The Scottish Executive issued a consultation paper on vulnerable adults.<sup>48</sup> The firm lead from the Executive is that protective laws should be extended beyond incapacitated people. The draft bill<sup>49</sup> attached to the consultation paper defines the category of people:

- ... adults who for the time being are both –
  - a) unable to safeguard their own welfare, property or financial affairs; and
  - b) in one or more of the following categories –
    - i. persons in need of care and attention by reason either of infirmity or the effect of aging ...

<sup>48</sup> *Consultation on Vulnerable Adults*, Scottish Executive, 2001.  
<sup>49</sup> See *Report on Vulnerable Adults*, Scottish Law Com No 158.

<sup>50</sup> Clause 2(1)(b).